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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

June 13, 2001

**EX PARTE  
VIA COURIER AND FACSIMILE**


Ms. Dorothy Attwood  
Chief, Common Carrier Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Re: In the Matter of Access Charge Reform, CC Docket 96-98; Petitions of  
AT&T Corp. and Sprint Communications Company for Declaratory  
Ruling, CCB/CPD 01-02**

Dear Dorothy:

Enclosed is a copy of the Plaintiffs' brief that we filed last week in *Advantel et al v. AT&T Corp.*, CA No. 00-643-A, currently pending before Judge Ellis in the United States District Court for the Eastern District of Virginia. The brief responds to Judge Ellis's request that the parties analyze the effect of recent Federal Communications Commission actions on the resolution of the federal district court lawsuits in which we are seeking to compel payment of access charges withheld by AT&T and Sprint and owed to 14 Competitive Local Exchange Carriers ("CLECs").

Sincerely,



David A. Konuch  
Counsel for Plaintiffs

cc: Alex Starr  
A.J. DeLaurentis  
Jeffrey Dygert

Glenn Reynolds  
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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
(Alexandria Division)

RECEIVED

JUN 13 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

ADVAMTEL, LLC *et al.*,

Plaintiffs,

v.

AT&T CORP.,

Defendant.

Civil Action No. 00-643-A

**PLAINTIFFS' RESPONSE TO  
THE COURT'S JUNE 4 ORDER**

On June 4, 2001, the Court entered an Order directing the parties to file a memorandum setting forth the proper resolution of the case at bar in light of the FCC's May 30, 2001 Memorandum Opinion and Order<sup>1</sup> (the "*BTI Rate Case Order*"), which addressed the reasonableness, on a retrospective basis, of the access rates charged by Plaintiff Business Telecom, Inc. ("BTI"). The *BTI Rate Case Order* did not address the issues related to constructive ordering that this Court referred to the FCC. On April 27, 2001, the Commission released its *CLEC Access Charge Order*,<sup>2</sup> which *did* consider explicitly issues relating to constructive ordering, *albeit* on a prospective basis. The *CLEC Access Charge Order* is scheduled to take effect on June 20, 2001, unless stayed by the FCC or by a court. The *CLEC*

<sup>1</sup> *AT&T v. Business Telecom, Inc.*, EB-01-MD-001, consolidated with *Sprint Corp. LP v. Business Telecom, Inc.*, EB-01-002, FCC 01-185 (rel. May 30, 2001) ("*BTI Rate Case Order*").

<sup>2</sup> *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146 (April 27, 2001) ("*CLEC Access Charge Order*"), attached hereto at Exhibit 1.

*Access Charge Order* outlines a framework for how the FCC believes these lawsuits should be resolved.

Approximately one month remains before the Court's six-month stay of this action will be lifted, but it is unclear if, prior to the July 19 deadline set by this Court, the FCC will issue an order explicitly addressing constructive ordering under tariffs effective prior to the date the *CLEC Access Charge Order* takes effect. As Plaintiffs have previously advised the Court, FCC representatives indicated in informal meetings and discussions with counsel that the FCC intended to address these questions. Since the issuance of the *CLEC Access Charge Order* on April 27, 2001, however, it is unclear whether the FCC believes that order is adequate to address the Court's referral, or whether it will issue another order to do so. Indeed, in recent informal discussions between Plaintiff's counsel and FCC personnel, the FCC personnel have pointedly refused to commit to the issuance of a further order.

Plaintiffs urge the Court to take the case back immediately, and to schedule trial as expeditiously as possible. The *CLEC Access Charge Order* provides the Court with more than adequate guidance as to the proper interpretation of the Communications Act,<sup>3</sup> and fully supports a judgment in Plaintiff's favor. Moreover, continued delay in this case – even the additional five weeks between now and the July 19 deadline – causes irreparable harm to Plaintiffs. When this Court initially stayed the case for six months pending referral to the FCC, Plaintiffs argued that such delay would prove disastrous to Plaintiffs. This statement was accurate to a tragic degree: in the five months since this case was stayed, two of the Plaintiffs – Advantel and WinStar – have declared bankruptcy. The millions of dollars in lawfully tariffed

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<sup>3</sup> Plaintiffs and Defendants will be meeting with the FCC on June 11, 2001 to discuss issues relating to the FCC complaints pending against BTI and the other Plaintiffs, at which time the FCC may provide additional information concerning the FCC's intentions.

access charges that AT&T has withheld from these carriers for more than two years contributed materially to these developments. Because the immediate resumption of this case would not prejudice any party, and continued delay would be highly prejudicial to Plaintiffs, the case should be reactivated without delay.<sup>4</sup>

As discussed herein, the FCC Orders already released provide ample guidance for the Court on the issues referred in the Court's Stay Order. More specifically, the *CLEC Access Charge Order* stands for two propositions: first, that existing law "require[s] IXCs to pay the published rate for tariffed access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable," *CLEC Access Charge Order* at ¶ 28; and second, that IXCs may *never* terminate or decline access services ordered or constructively ordered by CLECs whose rates are equal to or below the benchmark rates established by the FCC under 47 U.S.C. § 201(a). As such, the *CLEC Access Charge Order* strips AT&T and Sprint of any defense against Plaintiffs' claim of constructive ordering, and compels judgment for Plaintiffs.

## **BACKGROUND**

### **I. THIS COURT'S ORDERS**

On July 17 and July 21, 2000, the Court entered Orders referring Sprint and AT&T's rate reasonableness claims to the FCC under the doctrine of primary jurisdiction. *See Advantel, LLC v. Sprint Communications Co.*, 105 F. Supp. 2d 476 (E.D. Va. 2000); *Advantel, LLC v. AT&T Corp.*, 105 F. Supp. 2d 507 (E.D. Va. 2000).

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<sup>4</sup> If the Court seeks certainty as to the FCC's intention to issue an additional order or not, Plaintiffs are prepared to work cooperatively with Defendants to request that the FCC clarify its intention in writing to this Court, in order to avoid pointless delay in the completion of this case.

On January 5, 2001, the Court ordered a stay of the instant case pending referral to the FCC, under the primary jurisdiction doctrine, of two specific constructive ordering questions:

- (i) whether any statutory or regulatory constraints prevent Sprint [or AT&T], as an IXC, from terminating or declining services ordered or constructively ordered, and if not,
- (ii) what steps IXCs must take either to avoid ordering or to cancel service after it has been ordered or constructively ordered.

*Advantel, LLC v. Sprint Communications Co., L.P.*, 125 F. Supp. 2d 800, 807 (E.D. Va. 2001).

## II. THE FCC'S CLEC ACCESS CHARGE ORDER

On April 27, 2001, the FCC issued the *CLEC Access Charge Order*, which set a “bright-line” benchmark, or “safe harbor” rate, for determining presumptively reasonable CLEC access charges (initially 2.5 cents per minute or the rate charged by the competing ILEC, whichever is higher). *See CLEC Access Charge Order* at ¶¶ 41-46. The FCC set a higher rate for CLECs serving rural areas.<sup>5</sup> The *CLEC Access Charge Order* established that, on a going-forward basis, “CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable and CLECs may impose them by tariff.” *Id.* ¶ 3. For CLECs with tariff rates above the FCC benchmark, unless specifically negotiated higher with the IXC, “the CLEC must charge the IXC the appropriate benchmark rate.” *Id.*

The *CLEC Access Charge Order* further made clear that 47 U.S.C. § 201(a) “obligates IXCs to serve the end users of a CLEC that is charging rates at or below the

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<sup>5</sup> *See id.* at ¶ 73, 80. The FCC did not set a specific numeric benchmark, but rather set this rate roughly equal to the highest rate band tariffed by National Exchange Carrier Association (NECA). *See id.* at 80. By way of comparison, the retroactive rates set by the FCC in the *BTI Rate Case Order* were based on the *lowest* rate band for NECA carriers. *BTI Rate Case Order* at ¶ 57. The average rate for all NECA carriers is approximately 3.5 cents per minute.

benchmark.” *Id.* ¶ 89. In other words, it is unlawful for AT&T and Sprint to block calls to or from CLECs. The FCC made this finding because:

an IXC’s refusal to serve the customers of a CLEC that tariffs access rates within our safe harbor, when the IXC serves ILEC end users in the same area, generally constitutes a violation of the duty of all common carriers to provide service upon reasonable request.

*Id.* ¶ 5. When a “customer attempts to call from and/or to an access line served by a CLEC with presumptively reasonable rates, that request for communications service is a reasonable one that the IXC may not refuse without running afoul of section 201(a).” *Id.* ¶ 94. In short, “since the benchmark rate is conclusively presumed reasonable, an IXC cannot refuse to provide service to an end user served by the CLEC without violating section 201.” *Id.* ¶ 97.

In the *CLEC Access Charge Order*, the FCC criticized the IXCs’ willful flouting of CLEC tariff rates for access service in an improper attempt to coerce CLECs to lower their access service rates – the very conduct by AT&T and Sprint giving rise to the instant lawsuit:

[T]he major IXCs have begun to try to force CLECs to reduce their rates. The IXCs’ primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate. AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable. We see these developments as problematic for a variety of reasons. ***We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system.***

*Id.* ¶ 23 (footnotes omitted) (emphasis added). Similarly, the *CLEC Access Charge Order* criticized the IXCs’ threats to stop delivering traffic to, or accept traffic from, certain CLECs they may unilaterally view as “high-priced”:

AT&T has notified a number of CLECs that it refused to exchange originating or terminating traffic. In some instances, AT&T has terminated its relationship with CLECs and is blocking traffic, thus raising various consumer and service quality issues. These practices threaten to compromise the ubiquity and seamlessness of the nation's telecommunications network and could result in consumer confusion. . . . ***If such refusals to exchange traffic were to become a routine bargaining tool, callers might never be assured that their calls would go through. . . . [This] would represent a serious problem, and, in certain circumstances, it could be life-threatening.***

*Id.* ¶ 24 (footnotes omitted) (emphasis added). Finally, the *CLEC Access Charge Order* made it clear that the conduct of AT&T and Sprint was wholly improper and that no further impediment exists to Plaintiffs' straightforward collections actions against AT&T and Sprint pursuant to their filed tariffs:

CLEC access rates will be conclusively deemed reasonable if they fall within the safe harbor that we have established. Accordingly, an IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to this Commission to determine the reasonableness of the rate.

*Id.* ¶ 60.

### III. THE FCC'S BTI RATE CASE ORDER

The FCC issued the *BTI Rate Case Order* on May 30, 2001, and expressly addressed the necessarily backward-looking access service charge rate reasonableness claims referred by the Court in July 2001. *See AT&T Corp. v. Business Telecom, Inc.*, Memorandum Opinion and Order, No. EB-01-MD-001, FCC 01-185, ¶¶ 6-7 (rel. May 30, 2001):

These complaint proceedings arise from primary jurisdiction referral orders in . . . the *Advantel Litigation*. . . . Specifically, the court referred Complainants' claims that BTI and other CLECs charged unreasonably high access rates, in violation of section 201(b) of the Act.

The *BTI Rate Case Order* defined “a just and reasonable rate” on which to base damage calculations for past access service charges received by AT&T and Sprint. *Id.* ¶ 1. The retrospective *BTI Rate Case Order* expressly references and adopts the approach of the prospective *CLEC Access Charge Order*:

We find substantial guidance in the *CLEC Access Charge Order*’s determination that, for a year after its issuance, a rate of up to 2.5 cents per minute will be presumptively reasonable for CLEC access. Nothing in this record indicates that the considerations bearing on rate reasonableness during the retrospective period at issue here were markedly different from the circumstances the Commission considered in setting prospective tariff benchmarks.

*Id.* ¶ 55. Nonetheless, because access charges tariffed by most local carriers – CLEC as well as ILEC – were higher in the past than they are currently, the FCC concluded that it was reasonable for BTI to charge considerably higher rates in the past than the 2.5 cent rate prescribed prospectively in the *CLEC Access Charge Order*:

[W]e find that the just and reasonable rates for both originating and terminating access services during the relevant time period are as follows:

- July 1, 1998 through June 30, 1999      3.8 cents per minute
- July 1, 1999 through June 30, 2000      3.0 cents per minute
- July 1, 2000 through [May 30, 2001]      2.7 cents per minute

*Id.* ¶ 58.

## DISCUSSION

The FCC’s *CLEC Access Charge Order* provides the Court with all the guidance it requires on the issues referred in its Stay Order. The *CLEC Access Charge Order* has, in fact, substantively answered the first question referred in the Court’s Stay Order in the affirmative: Indeed, “*statutory or regulatory constraints [do] prevent . . . an IXC[] from terminating or*



*declining services ordered or constructively ordered . . .*” *Advamtel*, 125 F. Supp. 2d at 807 (emphasis added).<sup>6</sup>

The FCC has conclusively determined, in its *CLEC Access Charge Order*, that IXCs “*may not refuse*” to provide service to a CLEC end user customer who “attempts to place a call either from or to a local access line . . . served by a CLEC with presumptively reasonable rates” and that “CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable.” *CLEC Access Charge Order*, ¶¶ 94, 3 (emphasis added). The FCC has also definitively ruled that the Communications Act “obligates IXCs to serve the end users of a CLEC that is charging rates at or below the benchmark” and that “an IXC’s refusal to serve the customers of a CLEC . . . constitutes a violation” *Id.* ¶¶ 89, 5. Finally, the FCC has given the Court the benefit of its specialized agency expertise on the ultimate issues in this lawsuit. In the FCC’s view: (1) “IXCs appear routinely to be flouting their obligations under the tariff”; and (2) “an IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff . . . *Id.* ¶¶ 23, 60.

These findings are dispositive of the issues pending before the Court. As the citations from the *CLEC Access Charge Order* above make clear, it is a violation of Section 201 of the Communications Act for IXCs to block CLEC traffic that is priced at presumptively lawful rates. As Plaintiffs have demonstrated previously, the Communications Act requires, and the FCC has found, that rates filed on a streamlined basis – as all CLEC rates are – “shall be deemed lawful” unless and until the FCC finds otherwise and uses its prescriptive authority to change the rates. 47 U.S.C. § 204(a)(3); *see also* Second Amended Complaint (July 28, 2000) at

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<sup>6</sup> In light of the FCC’s affirmative answer to the first question, it is unnecessary to reach the second question, which the Court expressly conditioned on a negative response to the first question.

¶ 30 (“Under the Communications Act, the rates of ‘non-dominant’ carriers such as Plaintiffs are presumed reasonable when validly filed in Tariffs, as Plaintiffs’ have been”). As the FCC recently confirmed, “[t]ariffs require IXCs to pay the published rate for tariffed access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable.” *CLEC Access Charge Order* at ¶ 28.

These unequivocal statements of the law allow only one conclusion: because all of the Plaintiffs’ tariffed rates were deemed lawful at the time they were filed, AT&T and Sprint would have violated Section 201 of the Communications Act if they had refused to provide service to any of the Plaintiffs’ customers by blocking traffic. If the FCC subsequently decides that the rates were excessive, it may be able to change the rates going forward.<sup>7</sup> but this does not change the fact that AT&T and Sprint were prohibited at all times from terminating or declining services ordered or constructively ordered. This finding prevents AT&T and Sprint from contending that they did not constructively order service, and triggers their obligation to pay the lawfully tariffed rate under the filed rate doctrine.

AT&T’s counsel recognized in open court that if the FCC made such a finding, this case was effectively over:

ATTORNEY BENDERNAGEL: . . . Our basic position is we want [the FCC to clarify] the legal issue [of] whether . . . we have the right to say, ‘We are not accepting your service,’ or ‘We are declining your service,’ . . . . I mean, ***if [the FCC] come back and they say, ‘AT&T, you don’t have that right,’ we are finished here. I mean, it’s over to the 208 rate case, and there is nothing to decide here.***

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<sup>7</sup> In the *BTI Rate Case Order*, the FCC ordered retroactive adjustments to BTI’s rates. Any reference to the *BTI Rate Case Order* should not be taken as an endorsement of the FCC’s ruling in that case. Indeed, the FCC’s Order is wrongly decided and is profoundly flawed as a matter of fact and law, and unlikely to withstand appellate review if challenged in court. See *BTI Rate Case Order* at p. 29 (Dissenting Statement of Commissioner Harold Furchtgott-Roth).

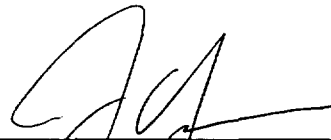
Transcript of Motions Hearing (Dec. 22, 2000) at 33, attached hereto as Exhibit 2 (emphasis added).

Indeed, the only issue left in the case is for the FCC to decide whether the rates tariffed by the Plaintiffs prior to the effective date of the *CLEC Access Charge Order* were reasonable. Such a finding can and should be made independently of a ruling by this Court. The Court should immediately award payment of the filed rates. The FCC can then determine whether any refunds to Defendants will be necessary. As the *BTI Rate Case Order* demonstrates, AT&T and Sprint are not helpless victims of the filed rate doctrine. If they believe CLEC access charges are excessive, relief is – and always has been – available to them through the formal complaint process before the FCC, pursuant to Section 208 of the Communications Act. This has been Plaintiff's position throughout the course of this lawsuit.

### CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court immediately reactivate the instant case, and proceed to trial on the issue of damages.

Respectfully submitted,



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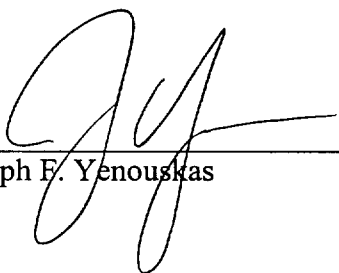
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Dated: June 8, 2001

**CERTIFICATE OF SERVICE**

I hereby certify that I have, this 8th day of June 2001, served Plaintiffs' Response to The Court's June 4 Order by causing copies of same to be delivered by United States mail, first-class postage prepaid, to (1) James Bendernagel, Esq., Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, counsel for AT&T Corp., and (2) J. William Boland, McGuire Woods, One James Center, 901 East Cary Street, Richmond, VA 23219

  
\_\_\_\_\_  
Joseph F. Yenouskas



**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
	)	
Reform of Access Charges Imposed by	)	
Competitive Local Exchange Carriers	)	

**SEVENTH REPORT AND ORDER AND  
FURTHER NOTICE OF PROPOSED RULEMAKING**

**Adopted:** April 26, 2001

**Released:** April 27, 2001

By the Commission: Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a separate statement at a later date.

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## I. INTRODUCTION

1. With this order, we continue our efforts to establish a “pro-competitive, deregulatory national policy framework” for the United States’ telecommunications industry by addressing a number of interrelated issues concerning competitive local exchange carrier (CLEC) charges for interstate switched access services and the obligations of interexchange carriers (IXCs) to exchange access traffic with CLECs.<sup>1</sup> Parties on both sides of these issues have

<sup>1</sup> In addressing these issues, the Commission has requested and received comments in several proceedings: *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order & Notice*); *Commission Asks Parties to Update and Refresh Record on Mandatory Detariffing of CLEC Interstate Access Services*, CC Docket Nos. 96-262 and 97-146, Public (continued....)



requested Commission involvement in shaping a resolution to what the IXCs view as the CLECs' abuse of our tariff rules to impose excessive access charges and what the CLECs view as the IXCs' unreasonable demands for lower access charges and threats to reject CLEC access traffic.

2. By this order, we seek to ensure, by the least intrusive means possible, that CLEC access charges are just and reasonable. Specifically, we limit the application of our tariff rules to CLEC access services<sup>2</sup> in order to prevent use of the regulatory process to impose excessive access charges on IXCs and their customers. Previously, certain CLECs have used the tariff system to set access rates that were subject neither to negotiation nor to regulation designed to ensure their reasonableness. These CLECs have then relied on their tariff to demand payment from IXCs for access services that the long distance carriers likely would have declined to purchase at the tariffed rate.

3. Our goal in this process is ultimately to eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services. We accomplish this goal by revising our tariff rules more closely to align tariffed CLEC access rates with those of the incumbent LECs. Under the detariffing regime we adopt, CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable and CLECs may impose them by tariff. Above the benchmark, CLEC access services will be mandatorily detariffed, so CLECs must negotiate higher rates with the IXCs. During the pendency of negotiations, or if the parties cannot agree, the CLEC must charge the IXC the appropriate benchmark rate. We also adopt a rural exemption to our benchmark scheme, recognizing that a higher level of access charges is justified for certain CLECs serving truly rural areas.

4. To avoid too great a disruption for competitive carriers, we implement the benchmark in a way that will cause CLEC rates to decrease over time until they reach the rate charged by the incumbent LEC. This mechanism will mimic the operation of the marketplace as competitive LECs will no longer be operating in the access market with tariffed rates well above the prevailing market price. We are optimistic that this approach will provide a bright line rule that permits a simple determination as to whether CLEC access charges are just and reasonable and, at the same time, will enable both sellers and purchasers of CLEC access services to avail

(Continued from previous page)

Notice, 15 FCC Rcd 10181 (Comm. Carr. Bur. 2000) (*Mandatory Detariffing Public Notice*); *Common Carrier Bureau Seeks Comment on the Request for Emergency Temporary Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision*, CC Docket No. 96-262, Public Notice, DA-00-1067, 2000 WL 217601 (Comm. Carr. Bur., rel. May 15, 2000) (*Emergency Petition Public Notice*); *Common Carrier Bureau Seeks Comment on Issues Relating to CLEC Access Charge Reform*, CC Docket No. 96-262, Public Notice, 15 FCC Rcd 24102 (2000) (*Safe Harbor Public Notice*). Below, we refer to a comment or reply comment to the *Pricing Flexibility Order & Notice* as Comment or Reply Comment, respectively. A comment or reply comment to the *Mandatory Detariffing Public Notice* is identified as Detariffing Comment or Detariffing Reply Comment, respectively. We refer to a comment or reply comment to the *Emergency Petition Public Notice* as Emerg. Pet. Comment or Emerg. Pet. Reply Comment, respectively. A comment or reply comment to the *Safe Harbor Public Notice* is identified as Safe Harbor Comment or Safe Harbor Reply Comment, respectively. Appendix A includes a list of parties filing comments in each of these proceedings.

<sup>2</sup> In this order, we use the term "access services" to refer only to interstate switched access services, unless we specifically indicate to the contrary.

themselves of the convenience of a tariffed service offering. In addition, this approach maintains the ability of CLECs to negotiate access service arrangements with IXC's at any mutually agreed upon rate. Naturally, the CLECs also retain the option of recovering from their end users any additional costs that they may experience.

5. The regulatory forbearance that we undertake today continues our move to market-based solutions by encouraging CLECs to negotiate rates outside of the tariff safe harbor where they see fit. We also make clear that an IXC's refusal to serve the customers of a CLEC that tariffs access rates within our safe harbor, when the IXC serves ILEC end users in the same area, generally constitutes a violation of the duty of all common carriers to provide service upon reasonable request.

6. Our order today is designed to spur more efficient local competition and to avoid disrupting the development of competition in the local telecommunications market currently taking root. We intend to allow CLECs a period of flexibility during which they can conform their business models to the market paradigm that we adopt herein. In addition, these rules should continue to ensure the ubiquity of a fully interconnected telecommunications network that consumers have come to expect. Finally, by ensuring that CLECs do not shift an unjust portion of their costs to interexchange carriers, our actions should help continue the downward trend in long-distance rates for end users.

7. We stress, however, that the mechanism set out below is a transitional one; it is not designed as a permanent solution to the issues surrounding CLEC access charges. Rather, we view the mechanism we adopt today as a means of moving the marketplace for access services closer to a competitive model. Because our tariff benchmark is tied to the incumbent LEC rate, we will re-examine these rates at the close of the period specified in the *CALLS Order*.<sup>3</sup> Through a separate notice of proposed rulemaking that we issue today, we also evaluate the access charge scheme as part of a broader review of inter-carrier compensation.<sup>4</sup>

## II. BACKGROUND

8. Competitive entrants into the exchange access market have historically been subject to our tariff rules, but have been largely free of the other regulations applicable to incumbent LECs.<sup>5</sup> Incumbent LECs, on the other hand, are closely regulated in their ratemaking to ensure that their interstate access charges are just and reasonable.<sup>6</sup> In recent years, the Commission has repeatedly examined access rates, attempting to make them more economically

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<sup>3</sup> *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (2000) (*CALLS Order*).

<sup>4</sup> *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Dkt. Nos. 01-92, 99-68, 96-98, FCC 01-132 (rel. April 27, 2001) (*Intercarrier Compensation NPRM*).

<sup>5</sup> See *Tariff Filing Requirements for Non-Dominant Common Carriers*, CC Dkt. No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754 (1993) (CLECs are non-dominant carriers because they have not been previously declared dominant), *vacated and remanded in part on other grounds, Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995); *on remand*, 10 FCC Rcd 13653 (1995).

<sup>6</sup> See *infra* note 93.

rational. Some of the overarching goals the Commission has pursued in this effort include the promotion of competition, aligning access rate structures more closely with the manner in which costs are incurred, the removal of subsidies from access rates and deregulation as competition develops.<sup>7</sup> The result of the Commission's efforts has been a steady reduction in access charges and in long distance rates which, in turn, has dramatically increased consumer usage of long distance service.

9. Although the access charge debate previously has focused primarily on dominant carriers, as CLEC market share has increased, a correspondingly greater interest in the rates of competitive carriers has developed. As a result, CLEC access charges recently have been the subject of several Commission proceedings and the filings of several parties.

10. The Access Reform NPRM: In the *Access Reform NPRM*, the Commission sought comment on whether CLECs can exercise market power with regard to terminating access services and whether and how the Commission should regulate those services.<sup>8</sup> The Commission noted the differences between the originating and terminating access markets. For example, with *originating* access, the Commission recognized that the calling party chooses the service provider and decides whether to place a call, and it has the ultimate obligation to pay for the call.<sup>9</sup> The calling party also is the customer of the IXC that purchases the originating access service.<sup>10</sup> The Commission tentatively concluded, that, as long as IXCs could influence the calling party's choice of the access provider, a LEC's ability to charge excessive originating access rates would be limited, because IXCs likely would create incentives for their end users to move to competing, less expensive access providers.<sup>11</sup> On the other hand, the Commission recognized that, with *terminating* access, the called party chooses the access service provider, while the decision to make the call and the ultimate responsibility to pay for the call reside with the calling party, and the calling party's IXC must pay for the terminating access service.<sup>12</sup> Because of this disjunction implicit in terminating access, neither the party placing a long distance call, nor that party's IXC, can easily influence the called party's choice of service provider.<sup>13</sup> The Commission noted that this may give CLECs the incentive to charge excessive rates for terminating access service.<sup>14</sup>

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<sup>7</sup> See *Access Charge Reform*, CC Docket 96-262, First Report and Order, 12 FCC Rcd 15982 (*Access Charge Reform Order*), *aff'd sub. nom. Southwest Bell v. FCC*, 153 F.3d 523 (8<sup>th</sup> Cir. 1998); *Pricing Flexibility Order & Notice*, 14 FCC Rcd 14221; *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (2000) (*CALLS Order*).

<sup>8</sup> *Access Charge Reform*, CC Docket 96-262, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21476 (1996) (*Access Reform NPRM*).

<sup>9</sup> *Id.* at 21472.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 21476.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

11. The Commission also noted an additional complication for an IXC faced with high CLEC access rates. Not only does the calling party not choose the terminating LEC, but section 254(g) requires IXCs to spread the cost of terminating access rates among all of its end users.<sup>15</sup> Accordingly, the Commission tentatively concluded in the *Access Reform NPRM* that terminating access may remain a bottleneck controlled by whichever LEC provides terminating access to a particular customer, even if competitors have entered the market.<sup>16</sup> The Commission also opined, however, that excessive terminating access charges might encourage IXCs to enter the access market themselves.<sup>17</sup>

12. The Hyperion Order: In the *Hyperion Order*, the Commission established permissive detariffing for non-incumbent LEC providers of interstate exchange access services.<sup>18</sup> The Commission also sought comment on mandatory detariffing for CLEC interstate access services.<sup>19</sup> The Commission did not take further action, however, because the District of Columbia Circuit Court of Appeals stayed the Commission's mandatory detariffing order for IXCs. Later, after the D.C. Circuit upheld the Commission's IXC mandatory detariffing order,<sup>20</sup> the Commission issued a public notice to refresh the record on the issue of mandatory detariffing for CLEC access services.<sup>21</sup>

13. The Access Reform Order: In the *Access Reform Order*, the Commission declined to adopt regulations governing CLEC terminating access charges, or to address the issue of CLEC originating access charges.<sup>22</sup> Based on the available record, the Commission decided to continue to refrain from regulating the rates charged by non-incumbent LECs for terminating access service.<sup>23</sup> Although an IXC must use the CLEC serving an end user to terminate a call,

<sup>15</sup> See 47 U.S.C. § 254(g). See also *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564 (1996) (requiring IXCs to integrate and average the rates they charge for service).

<sup>16</sup> *Access Reform NPRM*, 11 FCC Rcd at 21476.

<sup>17</sup> See *id.* at 21477. The Commission also sought comment on whether it should treat CLEC originating "open end" minutes, such as originating access for 800 service, as terminating minutes for access charge purposes. *Id.* "The term open end of a call describes the origination or termination of a call that utilizes exchange carrier common line plant (a call can have no, one, or two open ends.)" 47 C.F.R. § 69.105(b)(1)(ii). The Commission noted that, in some cases, such as 800 and 888 service, the called party, which pays for the call, is unable to influence the calling party's choice of provider for originating access services. *Access Reform NPRM*, 11 FCC Rcd at 21477.

<sup>18</sup> See *Hyperion Telecommunications, Inc. Petition for Forbearance*, Memorandum Opinion and Order, 12 FCC Rcd 8596 (1997) (*Hyperion Order*) (granting petitions seeking permissive detariffing for provision of interstate exchange access services by providers other than the incumbent LEC).

<sup>19</sup> *Hyperion Order*, 12 FCC Rcd at 8613.

<sup>20</sup> *MCI WorldCom, Inc. v. Federal Communications Commission*, 209 F.3d 760 (D.C. Cir. 2000).

<sup>21</sup> *Mandatory Detariffing Public Notice*, 15 FCC Rcd 10181.

<sup>22</sup> *Access Charge Reform Order*, 12 FCC Rcd at 15982.

<sup>23</sup> *Id.* at 16140.

the Commission found that the record did not indicate that CLECs previously had charged excessive terminating access rates or that CLECs distinguished between originating and terminating access in their service offerings.<sup>24</sup> As a result, the Commission concluded that CLECs did not appear to have structured their service offerings in ways designed to exercise market power over terminating access.

14. The Commission further observed that, as CLECs attempted to expand their market presence, the rates of incumbent LECs or other potential competitors should constrain the CLECs' terminating access rates.<sup>25</sup> The Commission found that access customers likely would take competitive steps to avoid paying unreasonable terminating access charges.<sup>26</sup> Thus, it explained that a call recipient might switch to another local carrier in response to incentives offered by an IXC.<sup>27</sup>

15. Although the Commission declined to adopt regulations governing the provision of CLEC terminating access, it noted that it could address the reasonableness of CLEC terminating access rates in individual instances through the section 208 process for the adjudication of complaints.<sup>28</sup> Moreover, the Commission stated that it would be sensitive to indications that the terminating access rates of CLECs were unreasonable, and it committed to revisit the issue of CLEC access rates if there were sufficient indications that CLECs were imposing unreasonable terminating access charges.<sup>29</sup>

16. Complaint Proceedings: The Commission addressed issues related to competitive carriers' access services in three different section 208 complaint proceedings.<sup>30</sup> On July 16, 1999, in *MGC v. AT&T*, the Commission ruled that AT&T was liable to MGC for originating access charges at MGC's tariffed rate because AT&T had failed to take the necessary steps to terminate its access service arrangement with MGC.<sup>31</sup> On June 9, 2000, in *Sprint v. MGC*, the Commission rejected the argument that a CLEC's access rates are *per se* unjust and unreasonable – and therefore violative of section 201(b) – because they exceed the rates charged by incumbent LECs in the CLEC's region.<sup>32</sup> Finally, on March 13, 2001, in *Total Tel. v. AT&T*,<sup>33</sup> the Commission ruled that a competitive access provider's rates for terminating access were the

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 16140-41.

<sup>27</sup> *Id.* at 16141.

<sup>28</sup> *Id.* See generally 47 C.F.R. §§ 1.720-1.735 (Commission rules governing formal complaints); 47 U.S.C. § 208.

<sup>29</sup> *Access Charge Reform Order*, 12 FCC Rcd at 16141.

<sup>30</sup> The Commission currently has before it several additional complaint proceedings. See *infra* note 56.

<sup>31</sup> *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999).

<sup>32</sup> *Sprint Communications Company, L.P. v. MGC Communications, Inc.*, 15 FCC Rcd 14027 (2000).

<sup>33</sup> *Total Tel. v. AT&T*, FCC 01-84, File No. E-97-003 (rel. Mar. 13, 2001) (*Total Tel. Order*).

product of a sham arrangement to inflate its rates and to pass on a portion of the inflated rate to the carrier's single end user. Accordingly, we ruled in that proceeding that AT&T did not violate sections 201(a), 202(a), 214(a) or 251(a) of the Act<sup>34</sup> when it declined the access provider's terminating access service and blocked traffic bound for the access provider's single end-user customer.

17. *Pricing Flexibility Order and Further Notice of Proposed Rulemaking*: In August of 1999, the Commission issued its *Pricing Flexibility Order and Notice*, which, *inter alia*, denied AT&T's petition for a declaratory ruling that IXC's may refuse to purchase CLEC's tariffed switched access service.<sup>35</sup> The Commission noted that, in the *Access Charge Reform Order*, it may have overestimated the ability of the marketplace to constrain CLEC access rates.<sup>36</sup> In particular, the Commission noted that AT&T's Petition for Declaratory Ruling, the comments provided in support of it, and the decision in *MGC v. AT&T* suggested the need to revisit the issue of CLEC access rates.<sup>37</sup> Accordingly, the Commission initiated the current rulemaking proceeding to examine CLEC originating and terminating access rates, and it sought comment on regulatory and market-based solutions to ensure that CLEC rates for interstate access are just and reasonable.<sup>38</sup>

18. The Commission again invited comment on, *inter alia*, whether CLEC's possess market power over IXC's that need to terminate long distance calls, whether mandatory detariffing of CLEC interstate access services would provide a market-based deterrent to excessive terminating access charges, and whether rates could be constrained by establishing a benchmark for CLEC access charges that would be presumed reasonable.<sup>39</sup> We acknowledged that CLEC access rates may, in fact, be higher due to the CLEC's high start-up costs for building new networks, their small geographical service areas, and the limited number of subscribers over which CLEC's can distribute costs.<sup>40</sup> We also recognized, however, that IXC's currently spread their access costs among all their end users and that requiring IXC's to bear a CLEC's higher start-up costs may impose unfair burdens on IXC customers that pay rates reflecting these CLEC costs even though many of the IXC customers may not subscribe to those CLEC's.<sup>41</sup>

19. *The CALLS Order*: During the course of the debate over CLEC access charges, the Commission adopted an integrated interstate access reform and universal service proposal put forth by the members of the Coalition for Affordable Local and Long Distance Service

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<sup>34</sup> 47 U.S.C. §§ 201(a), 202(a), 214(a), 251(a).

<sup>35</sup> *Pricing Flexibility Order & Notice*, 14 FCC Rcd 14221.

<sup>36</sup> *Id.* at 14339.

<sup>37</sup> *Id.* at 14340.

<sup>38</sup> *Id.* at 14340.

<sup>39</sup> *Id.* at 14340-45.

<sup>40</sup> *Id.* at 14343.

<sup>41</sup> *Id.*